

STATE OF VERMONT
PUBLIC SERVICE BOARD

Investigation into (1) whether ENVY Nuclear Vermont)	
Yankee, LLC, and ENVY Nuclear Operations, Inc.,)	
(collectively, “ENVY VY”), should be required to cease)	Docket No. 7600
operations at the Vermont Yankee Nuclear Power Station, or)	
take other ameliorative actions, pending completion of repairs)	August 26, 2010
to stop releases of radionuclides, radioactive materials, and,)	
potentially, other non-radioactive materials into the environment;)	
(2) whether good cause exists to modify or revoke the)	
30 V.S.A. § 231 Certificate of Public Good issued to ENVY VY;)	
and (3) whether any penalties should be imposed on ENVY VY for)	
any identified violations of Vermont Statutes or Board orders related)	
to the releases.)	

NEC’S BRIEF REGARDING THE BOARD’S JURISDICTION

The New England Coalition, Inc. (“NEC”), by and through its attorney Jared M. Margolis, hereby provides the following Brief Regarding the Board’s Jurisdiction in the above-captioned Docket.

MEMORANDUM OF LAW

1. Introduction

The Board has opened this docket to determine what actions should be taken in response to the leaks of radionuclides that were discovered at the Vermont Yankee station in January of this year. Entergy has argued that Board action in response to these leaks is preempted by federal law, and the Board has requested the parties to provide briefs on the scope of the Board’s jurisdiction to take action in response to the releases of contaminants at the VY station. NEC believes that the Board has jurisdiction, pursuant to U.S. Supreme Court precedent in *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983) (herein “*PG&E*”), to take action to protect the economic and land-use related interests of

Vermont from the impacts of these and potential future leaks, and to hold Entergy liable for their violations of Vermont law and to provide sanctions for their failure to act in a reasonable and timely manner in response to the leaks.

There can be no doubt that the leaks of radionuclides at VY raise serious non-preempted concerns that necessitate action to protect the interests of Vermont. The Board has even stated that the leaks have engendered land-use and economic-related concerns, which are not preempted by federal law:

[i]t appears indisputable that the leaks may result in increased site contamination that could substantially increase decommissioning costs. Increased site contamination could also delay completion of the decommissioning process, which in turn could affect the future economic use of the site. These concerns do not fall within the preempted sphere of radiological health.

Investigation into Entergy Nuclear Vermont Yankee, Docket 7600, Order of 2/25/2010 at 8 (emphasis added).

The actions that NEC suggests the Board take to ameliorate the leaks, prevent future leaks and to sanction Entergy for their violations of Vermont law and failure to take timely action to protect Vermont's groundwater all clearly fall within the Board's jurisdiction and outside the preempted sphere of radiological health.

Moreover, Entergy has made these same arguments regarding preemption in prior dockets before the Board. The Board has clearly and consistently ruled that Entergy's interpretation of preemption is not supported by the same cases that they again cite to in this docket, and the Board has found that it does indeed retain jurisdiction over traditional state concerns regarding economics and land-use. Entergy is attempting to relitigate in this docket an issue that has already been decided by the Board, and therefore pursuant to the doctrine of issue preclusion, they are barred from making these same ineffective arguments. Entergy has not

shown any reason or circumstances that would compel the Board to alter its previous findings on this issue and as the Board's prior rulings on preemption are clear and consistent with controlling law, the Board should now find that Entergy is precluded from relitigating this issue.

Therefore, all that the Board need consider is whether the proposed actions that the parties recommend be taken in response to the leaks are not meant to directly control issues related to radiological health or safety levels – the only clearly preempted area pursuant to *PG&E* – but rather are intended to protect the economic and land-use related concerns that are traditional state matters, and which remain within the jurisdiction of the Board.

2. Entergy Is Precluded From Relitigating The Issue Of Preemption, Which Has Already Been Decided By The Board.

The issue of preemption has been brought before this Board several times in the past by Entergy. *See* Investigation into General Order No. 45, Docket 6545, Order of 7/11/02; Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06. As discussed above, the Board has repeatedly held that the regulation of Vermont Yankee is one of dual jurisdiction, with the state maintaining authority to regulate economic and land use related matters. Whereas Entergy has already brought these same arguments before the Board, they are now precluded from relitigating this matter under the doctrine of issue preclusion.

The doctrine of issue preclusion prevents “subsequent relitigation of an issue that was actually litigated and decided in a prior case where that issue was necessary to the resolution of the dispute.” *In re T.C.*, 2007 VT 115, ¶ 20, 182 Vt. 467 (quotation omitted). All five of the following factors must be met for issue preclusion to apply:

(1) Preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265 (1990) (citing *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 122 P.2d 892, 895 (Cal. 1942)).

In determining whether the last two factors above have been met, courts are instructed to consider

the type of issue preclusion, the choice of forum, the incentive to litigate, the foreseeability of future litigation, the legal standards and burdens employed in each action, the procedural opportunities available in each forum, and the existence of inconsistent determinations of the same issue in separate prior cases. In short, in order to satisfy the final two criteria, the party opposing [issue preclusion] must show the existence of circumstances that make it appropriate for an issue to be relitigated.

Id. at 265-66 (footnotes and citations omitted).

It is clear that all of the factors necessary to apply the doctrine of issue preclusion are present in this matter. There can be no doubt that this is the identical party that made the same preemption arguments in previous dockets, since those matters (i.e. Dockets 6545 and 7082) involved issues related to Vermont Yankee and Entergy's ownership and management of the plant, and the preemption arguments were made by Entergy themselves. There can also be no doubt that these matters have been resolved by a final judgment on the merits. In Docket 7082 the Board specifically addressed Entergy's preemption arguments in the final order, and found that the Board was in fact not preempted as Entergy argued. This final judgment, on the merits of Entergy's claim, should now preclude Entergy from relitigating this matter in this docket. *See* Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06 at 65-69.

Furthermore, the issue is clearly the same as the issue raised by Entergy in these prior dockets, which is whether the state has the authority to regulate Entergy as the operator of a nuclear power plant regarding matters that may affect the economic concerns of Vermont or

future use of the site – even when those matters involve radionuclides.¹ Entergy has now repeatedly claimed that the Board lacks jurisdiction, and the Board has resolved that question with an unambiguous reply – Entergy misreads the case law, and their arguments are an unfounded attempt to restrain the Board from retaining jurisdiction over areas that are traditionally left to the states. *See* Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06 at 66 (citing *PG&E*, 461 U.S. at 205).

It is further clear that Entergy had a full and fair opportunity to litigate this issue in prior dockets, and that applying preclusion would be fair. Entergy was represented by competent counsel and had the opportunity and ability to fully argue the issue of preemption in these dockets. Entergy certainly had an incentive to fully litigate this issue, especially since the foreseeability of future litigation (i.e. regarding relicensing) that would potentially engender arguments regarding preemption was known, and it is clear from the Board’s Order in Docket 7082 that Entergy made a valiant, albeit misguided, attempt to argue this issue, resulting in the Board dedicating considerable time to reviewing and discussing their arguments, with the result

¹ In fact, it could be argued that the situation at issue in Docket 7082 – the storage of spent nuclear fuel in dry casks on the VY site – provided an even more compelling argument regarding preemption than the leaking of radionuclides at issue in this docket. Since the storage of spent nuclear fuel requires an NRC permit, it comes well closer to the fine jurisdictional line of regulating radiological health and safety, which remains NRC’s jurisdiction, and would potentially have much more of a “direct and substantial” effect on radiological safety pursuant to *English v. General Electric Co.*, 496 U.S. 72, 85 (1990), since dry cask storage involves the handling of nuclear fuel. The Board found that it retained jurisdiction in Docket 7082, and therefore there is no justifiable argument for preemption to apply in this docket. *See Infra*.

that the Board found them unconvincing.² See *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 65-69.

Moreover, Entergy has not shown that there are circumstances present in this matter that make it appropriate to relitigate the issue of preemption, nor could they. The arguments that Entergy has made regarding preemption before the Board were presented as recently as 2006 (Docket No. 7082), and those arguments were nearly identical to the arguments made in this matter. The Board rejected those arguments, holding that the Board retains jurisdiction over matters that “do not relate solely to safety, but also ... have land use or financial implications for the state.” *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 64-65. Entergy has cited no new case law or changes in the regulatory field that have occurred since they made these same arguments in 2006. All of the case law they cite predates Docket 7082, no new arguments have been offered, and the Board’s determinations have been consistent – therefore there is no cause to revisit this issue.

Furthermore, the recent leaks of tritium do not provide circumstances that make it appropriate to relitigate this issue. In Docket 7082, as in this docket, the Board was concerned with the potential economic and land-use related effects and problems associated with radioactive material on-site at VY. While the facts differ, the basic issues regarding preemption in these dockets are almost identical; whether the Board has jurisdiction to control issues related to radionuclides (the storage of it in Docket 7082 and the leaking of it in this docket) where there

² Entergy now argues that “The Board misinterprets the Supreme Court’s decision in *Pacific Gas & Electric* ... when it cites that case for the proposition that it has jurisdiction over the construction and operation of the VY Station so long as its actions are ‘economically’ motivated.” Entergy Preemption Brief at 2-3. Entergy’s argument is not only blatantly incorrect pursuant to *PG&E*, see *infra*, but it was available to Entergy had they chosen to appeal the Board’s decision in Docket 7082 to the Vermont Supreme Court. Entergy chose not to pursue an appeal, and therefore this issue has been decided on the merits by this Board, and relitigating it is barred under the doctrine of issue preclusion.

are economic and land use matters at stake.³ The Board's answer is clear and was reiterated at the opening of Docket 7600:

[the Board is] not preempted from taking action in response to the leaks at Vermont Yankee, to the extent that the leaks may have economic and other non-radiological-health-and-safety consequences and to the extent that our action neither conflicts directly with NRC's exercise of its federal jurisdiction nor frustrates the purpose of the federal regulation.

Investigation into Entergy Nuclear Vermont Yankee, Docket 7600, Order of 2/25/2010 at

7. It is therefore clear that the doctrine of issue preclusion bars Entergy from relitigating whether the Board has jurisdiction to regulate Vermont Yankee. The Board has held that they are not preempted from taking action in response to the leaks, to the extent that the leaks may have economic and other non-radiological-health-and-safety consequences. Entergy's arguments impermissibly attempt to revisit this same issue; however the Board must not entertain this attempt to reargue matters that have already been settled. This issue was litigated and decided previously, and the Board must disregard Entergy's arguments and find that they are precluded from relitigating this matter.

The only remaining question, then, is whether the proposed actions that the parties recommend be taken in response to the leak are intended to protect economic and land-use related matters that are traditional state concerns, and remain within the jurisdiction of the Board. NEC's recommendations, set forth below, are all clearly intended to address these non-preempted concerns, and therefore are within the jurisdiction of the Board.

³ NEC notes that the test for issue preclusion does not require identical facts for the doctrine to apply, only that the issue is the same in the previous and current matter, which is clearly the case here. See *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990).

3. The Specific Actions That NEC Suggests The Board Take Are Not Preempted.

- a. *The Specific Ameliorative And Responsive Actions NEC Suggests The Board Enforce Against Vermont Yankee All Pertain To Economic And/Or Land-Use Concerns That Are Not Preempted.*

The issue of preemption must be put into the context of the relief sought, and the Board must consider whether they have jurisdiction to take the specific actions that are being requested by the parties. While Entergy's contention that "the Board is preempted from granting any of the relief sought in this docket with respect to the leakage" is unquestionably untenable, Entergy Preemption Brief at 2, oversight of Vermont Yankee is one of dual jurisdiction, and therefore certain areas of oversight may be preempted, while others are not. The ameliorative and responsive actions that NEC suggests the Board enforce against Entergy do not impinge on the federally-preempted field of radiological health and safety, *PG&E*, 461 U.S. at 190, but rather concern economic and land-use related matters within the traditional police powers of the state, and which the U.S. Supreme Court has specifically ruled remain within the states jurisdiction. *Id.* at 217, 223.

First, NEC maintains that the Board should order Entergy to undertake a thorough examination of all of the underground, buried and hard to access piping at the VY station, in order to assess their condition and potential for further leaks, and provide a plan to maintain ageing underground pipes to prevent any future leaks at the site. Absent a thorough, probing, and detailed examination for thinning, stress effects, and corrosion there can be no assurance that additional leaks will not occur in the near term or in the proposed extended period of operation. Testimony of Raymond Shadis 7/2/10 at 12. The Board cannot be certain that this round of leaks is curtailed and the next round of leaks, which could only serve to aggravate the present threat, is headed off until we have assurance that all susceptible radionuclide bearing plant systems are

examined end-to-end, inside and out. Until that is completed and all susceptible systems are found to be in good order and/or replaced or repaired, there can be no assurance that the groundwater and drinking water resources of Vermont are not at dire risk. *Id* at 12-14.

Ordering such a study is therefore necessary to prevent further economic, environmental and land-use related harm to Vermont. The potential for future leaks is a serious threat that would potentially increase decommissioning costs, harm the use of the VY site after the cessation of current operations, and exacerbate the contamination of groundwater and aquifer resources in and around the VY station. This action is therefore motivated by clearly economic and land-use concerns, and not radiological health. As will be discussed further below, ordering such a study would therefore be within the jurisdiction of the Board.

The underground pipes that Entergy has identified as a source of the tritium leak may not, however, be the only source of contamination, and therefore NEC would also propose that the Board order Entergy to conduct a more thorough examination of the Condensate Storage Tank (CST) and surrounding area. Entergy has reported that their efforts using the extraction well have resulted in greatly reduced concentrations of tritium in the test wells at the VY station. It could well be that this reduced level of concentration is indicative of a shrinking pool of contaminated water, but it could just as well indicate only that the extraction pump is drawing in water from more distant reservoirs, changing flow patterns beneath the site, and mixing and spreading tritiated water along with reducing immediate or local concentrations. Testimony of Raymond Shadis 7/2/10 at 13-14. Therefore there is still the possibility that not all sources of contamination have been discovered and remediated.

Moreover, Attachment 2.1 to the Root Cause Evaluation, EN-LI-118 REV 12 at page 52, specifically states that “the elevated reading at Monitoring Well GZ-7 may be indicative of a

leak in the CST area.” It is therefore unbelievable that as of August 27 – nearly 8 months since the tritium contamination was discovered – a thorough examination of the CST and surrounding area has not been undertaken. If the CST is leaking, then this is an additional source of contamination that will increase decommissioning costs and contamination of the groundwater and aquifer at VY. Requiring Entergy to undertake further analysis to prevent continuing leakage from the CST is necessary to avoid further contamination that could increase the decommissioning costs and hinder the reuse of the VY site in the future, and therefore falls squarely within the Board’s jurisdiction.

NEC would also ask the Board to order Entergy to provide sufficient money, placed into the decommissioning fund, to cover the costs of remediating the area affected by the current leak. By Entergy VY’s own admission, the tritium leaks have thus far spread through more than 30,000 cubic yards of soil and Vermont Yankee workers have cross-contaminated the leak-tracing excavation site with what Entergy VY presumes is preexisting radiological contamination, including traces of cesium 137, strontium 90 and other isotopes. Testimony of Raymond Shadis 7/2/10 at 9. Entergy VY stated in their testimony that the cost of addressing residual radiation from the 1996 chemistry sink drain leak would be about \$66 per cubic foot. If this cost figure were applied to the tritiated water leak affected area, then the cost of survey and remediation could be as much as \$53,460,000 or more. *Id* at 10.

As has been discussed in Docket No. 7440, the decommissioning fund is, at this time, apparently not adequate to cover the costs of decommissioning VY even without the added cost of extensive contamination from radionuclide leaks. This additional expense raises the specter of a default or diversion of funds from those allocated for the site to be restored to Greenfield status, or both. Testimony of Raymond Shadis 7/2/10 at 11-12. Entergy VY’s ongoing refusal

to contribute any portion of its VY revenues to the decommissioning fund makes this a dangerous situation for Vermont, and therefore the Board must ensure that the economic interests of Vermont are protected by securing additional funds. *Id.* Ensuring that sufficient funds are available for site remediation is necessary to ensure that the site may be reused in a timely fashion following cessation of use by Entergy, and ordering Entergy to provide funds to address the increase in decommissioning costs attributable to the tritium leaks is within the Board's jurisdiction to regulate economic concerns and is necessary to protect Vermont from potential shortfalls in the decommissioning fund. These are therefore economic and land-use related concerns that are not preempted pursuant to PSB and Supreme Court precedent.

Lastly, NEC believes that sanctions are warranted for Entergy's violations of state laws, which make it illegal for Entergy to discharge unpermitted pollutants into the groundwater and surface waters of the state, as well as for their failure to respond to the leaks in a timely manner. The testimony provided by ANR witnesses makes it very clear that a permit is required for the discharge of pollutants, including radionuclides such as tritium, and that these discharges must be controlled and monitored. 10 V.S.A. § 1259, 1263; Testimony of ANR witnesses 7/2/10⁴ (setting forth all of the permits and parameters for authorized discharges from the VY station and noting that the tritium leaks at issue in this docket are not covered by any of Entergy's discharge permits). The leaks at the VY station were not permitted, not monitored and therefore violate Vermont state law.

Pursuant to Title 30 V.S.A. § 209(a)(6), the Board has jurisdiction "[t]o restrain any company subject to supervision under this chapter from violations of law," which was further made clear in Entergy's CPG, which states that Entergy VY must "comply fully with Vermont

⁴ See ANR prefiled testimony of Chris Thompson at 3; Dan Mason at 4; John Akielaszek at 4.

law to the extent that its requirements are not inconsistent with specific requirements imposed by FERC, NRC, the Securities and Exchange Commission and any other federal agencies exercising authority over Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.”

Investigation into General Order No. 45, Docket 6545, Certificate of Public Good Issued 6/13/2002 at 2.

Additionally, the Board should sanction Entergy for their failure to take timely and reasonable actions to prevent harm to the groundwater and surface water resources in and around the VY station. Not only was Entergy aware of sink-holes in the vicinity of the AOG area up to two years ago – which should have resulted in a thorough inspection of the area that could have prevented or drastically reduced the extent of contamination from these leaks⁵ – but within a few days of discovering the leaks Entergy had a list of suspected sources, which included the AOG area; however Entergy did not perform a detailed examination of the AOG until after the tedious, several-week exercise of test well drilling and excavation, starting as far away from the AOG as could be managed. Testimony of Raymond Shadis 7/2/10 at 16. Rather than reduce or eliminate the leak of contaminants by depressurizing suspect plant systems, Entergy chose to continue operating the plant at full throttle. The extent of the tritium contamination is therefore the result of Entergy’s insistence on completing a record breaker-to-breaker reactor run, at the expense of

⁵ In fact, the Rutland Herald reported that a “state official said he believes the radioactive leak at Yankee had been going on for two years before it was discovered by Entergy Nuclear in early January, based on hydrology studies of the site.” (See article dated May 28, 2010 – provided to the Board with NEC’s Supplemental Response to International Brotherhood of Electrical Workers, Local 300’s (“IBEW”) Motion to Close Docket 7600). The article further stated that “NSA said the failure to look into the [presence of] sinkholes was a ‘missed opportunity’ to find the leak a year or more before the leak was discovered. The first condition report filed by Entergy engineers about the sinkholes was in July 2008, NSA noted.” *Id.* Neil Sheehan, a spokesman for the Nuclear Regulatory Commission, stated that “when the [AOG] area was excavated, it was eventually determined the leakage coming out of the piping tunnel was responsible for the depression.” *See Id.*

Vermont's environment and groundwater resources. *Id.* at 17. The Board must not tolerate such blatant disregard for the public good of Vermont, and therefore sanctions are appropriate.

Ordering monetary sanctions for these violations and for Entergy's failure to respond to the leaks in a timely manner would penalize Entergy for the harm they have caused to Vermont's economic and land-use related interests, both to the site itself and the Vermont "brand" that has been severely damaged by these leaks, and as is discussed further below such sanctions are within the Board's jurisdiction and not preempted by any federal regulation of VY.

b. The Actions NEC Recommends The Board Take Are Not Preempted, As They Are Within The Traditional And Retained Jurisdiction Of The States To Deal With Economic And Land-Use Related Concerns, And The NRC Has Not Taken Action On These Matters.

Should the Board decide not to apply the doctrine of issue preclusion, and revisit the issue of preemption in this docket, it is clear from the controlling case law that the state retains significant jurisdiction over Vermont Yankee, and that the actions set forth above which NEC recommends the Board take in response to the leaks are not preempted. Simply put, the Board is not preempted, pursuant to *PG&E* and subsequent cases, from taking actions that specifically pertain to non-radiological-health-and-safety concerns, such as economic and land-use matters, which the U.S. Supreme Court has ruled remain within the purview of the states.

The Court in *General Electric* ruled that "the *PG&E* Court 'defined the pre-empted field, in part, by reference to the motivation behind the state law.'" *English v. General Electric Co.*, 496 U.S. 72, 85 (1990). The motivation behind all of the actions NEC suggests the Board take is not to control the operation of VY or radiological health and safety issues, but rather to protect the economic and land-use related interests of Vermont. These actions are therefore not preempted pursuant to settled precedent, and whereas the NRC is not acting to protect the interests of Vermont, the Board must and can respond accordingly.

i. Well-Settled Precedent Provides For State Jurisdiction Over Traditional State Economic And Land-Use Related Concerns.

Supreme Court precedent explicitly states that the regulation of nuclear facilities is one of dual jurisdiction, with states retaining significant authority to regulate matters pertaining to traditional state concerns regarding economic and land-use related impacts. The Supreme Court specifically stated in *PG&E* that Congress:

intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that States retain their traditional responsibilities in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.

PG&E at 205. The Board made this clear in Docket 7082, stating that “[t]his dual regulatory scheme extends even to matters related to nuclear materials, notwithstanding the broad preemption.” Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06 at 16.⁶ The Board in that docket cited to the *PG&E* decision, which “notes that federal law explicitly preserves state authority to regulate these activities for other purposes, stating that ‘Nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.’” *Id.* at 16-17 (citing 42 U.S.C. § 2021(k)).

⁶ This is consistent with *PG&E*, wherein the Court stated that:

This account indicates that from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear powered electricity generation: the Federal Government maintains complete control of the safety and “nuclear” aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.

PG&E n.19 (emphasis added).

The Supreme Court’s ruling in *PG&E* therefore provides significant jurisdiction for the Board to regulate Vermont Yankee. While it remains clear that the Board cannot directly regulate radiological safety, the Board may act within the areas of traditional state concern, such as to protect the economic or land-use interests of Vermont, and actions taken for those purposes are not preempted pursuant to *PG&E*. State authority remains unless there is a direct conflict with federal requirements, and it is clear that the actions NEC has discussed above create no such conflict.

Entergy’s arguments and the cases they cite to for support are inapposite, and they have made no valid claim that Board action in response to the tritium leaks would in any way frustrate the purpose of Congress’ objectives, or that it is impossible to comply with both federal and state laws in responding to the tritium leaks. See *Hillsborough County v Automated Medical Labs*, 471 U.S. 707 at 713 (1985) (setting forth the basic concepts of conflict preemption).⁷ The Supreme Court in *PG&E* stated that “[t]he test for preemption is whether ‘the matter on which the State asserts the right to act is in any way regulated by the Federal Act.’” *PG&E* at 213 (citation omitted). Entergy has made no showing that any federal act provides the NRC with jurisdiction over tritium leaks or resulting groundwater contamination, and as is discussed *infra*, NRC has not itself asserted control over groundwater contamination from radionuclide leaks.

The Court in *PG&E* went on to discuss the fact that Congress did not intend to remove state’s authority to regulate nuclear power plants, and that “statements on the floor of Congress

⁷ Congress can preempt state authority through either express terms of legislation or by enactment of a scheme of federal regulation that is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Hillsborough County*, 471 U.S. at 713 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). None of these situations apply to the leak of tritium at the VY station or the responsive actions that NEC has suggested *supra*.

confirm that while the safety of nuclear technology was the exclusive business of the Federal Government, state power over the production of electricity was not otherwise displaced,” by the Atomic Energy Act. *PG&E* at 213. This sentiment was reiterated by the Board in Docket No. 7082, where the Board found that “The Atomic Energy Act has been interpreted so as to preempt states from becoming involved in the field of nuclear safety, certainly. However, it cannot automatically be interpreted to preempt states from regulating land use or from measures states may undertake to ensure what a state considers acceptable land use.” *Petition of Entergy Nuclear Vermont Yankee*, Docket 7082, Order of 4/26/06 at 68 (citing *Kerr-McGee v. City of West Chicago*, Nuclear Reg. Rep. P 20, 515, 59 USLW 2243, 32 ERC 1095, 20 Env’tl. L. Rep. 21, 369 (1990)).

Entergy has made no showing that Board action in response to the tritium leaks is in any way regulated by a Federal Act in such a way as to displace traditional state authority over economic and land-use concerns. NEC maintains that Board action is necessary to protect Vermont from adverse economic impacts, as well to protect the current and future use of the VY station and surrounding lands impacted by Entergy’s failure to prevent and properly control the radionuclide leaks, which the above-stated precedent shows to be within the jurisdiction of the Board.

Entergy further claims that “Imposing penalties for violation ‘of Vermont statutes or Board orders related to the releases’ is one means of regulating construction and operations with respect to releases and hence is also preempted; in the analogous context of tort actions, courts consistently have held that liability based on violation of state emissions standards is preempted.” Entergy Preemption Brief at 3-4. This completely ignores *English v. General Electric Co.*, 496 U.S. 72 (1990), which dealt directly with the question of whether the AEA

preempts state common law tort claims. The Court answered with a resounding “no,” finding that recovery for a tort action was not preempted. *Id.*

The Court in *General Electric* did find that “state action will be preempted if it has a ‘direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels,’” however “this does not include ‘every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities....’” *Id.* at 85 (citations omitted – emphasis added). Therefore, *General Electric* does not support Entergy’s argument that any Board action which has a “direct and substantial” effect on decision-making with respect to the VY Station’s construction and operations is preempted. Entergy Preemption Brief at 2.

Entergy has attempted to invent a preemption doctrine based on cherry-picked language and unfounded assumptions. Entergy focuses on the above-quoted language from *General Electric* which states that Board action would be preempted if it has a “direct and substantial” effect on decisions made by a nuclear plant operator, but they fail to understand or acknowledge that the Court in *General Electric* provided an important limitation to that statement; preemption only applies to state actions that would impact decision-making “concerning radiological safety levels.” *General Electric* at 85 (emphasis added). This language indicates that the Supreme Court in *General Electric* did not intend to alter its holding in *PG&E*, which provided that states retain jurisdiction over traditional state concerns, but was merely clarifying that control over radiological safety levels remains within NRC’s jurisdiction. Entergy attempts to stretch the meaning of this language past the point of credulity, arguing that ANY attempt to regulate VY – even the imposition of monetary sanctions – is preempted because it may affect their (historically dreadful) decision-making abilities regarding plant construction and operations. *General*

Electric does not in any way support this contention. Where the states actions do not pertain to radiological safety levels, as is the case in this matter, there is no preemption pursuant to *General Electric*.

In *General Electric*, the Court in fact ruled that the payment of tort claims was neither “direct nor substantial enough to place the petitioner’s claim in the preempted field.” *Id.* The imposition of monetary sanctions is analogous, as it would have no direct or substantial effect concerning radiological safety levels, and there is simply no shred of credibility in Entergy’s argument that the payment of sanctions would have a “direct and substantial” effect on decision-making with respect to VY “construction and operations,” which as discussed above is simply not a correct reading of the Court’s language (*i.e.* the Court stated that actions that have a direct and substantial impact on “radiological safety levels” may be preempted, not on “construction and operations”). Entergy Preemption Brief at 2. Their argument that sanctions would somehow affect Entergy’s decision-making ability, or that monetary sanctions can be seen as an attempt to indirectly regulate in the preempted field of radiological health and safety is unsupported by any salient facts or case law, and the Board must disregard this blatant attempt to impermissibly change settled precedent.

An example of state action that would have a “direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels,” can be seen in *United States v. Manning*, 434 F.Supp.2d 988 (E.D. Wa. 2006), which Entergy cites for the proposition that state action is preempted when it has a direct and substantial effect on decisions made by those who build or operation nuclear facilities. Entergy Preemption Brief at 19. However, this case is easily distinguishable from the Board’s current investigation. Unlike the intent of the actions taken by the Washington legislature at issue in

Manning, which sought to regulate discharges that contained a mixture of radiological and non-radiological pollutants (an obvious attempt to regulate radiological safety levels), the motivation behind the actions NEC has recommended herein is not to regulate waste or to control radiological safety levels, but rather is focused on protecting the interests of Vermont from the adverse economic and land-use related consequences of the leaks.

Additionally, in *Manning* the Washington legislature was expressly motivated by concerns over the health and environmental impacts caused by radionuclides and the Washington law at issue had a direct and substantial impact on DOE operations because it required DOE to get an additional state permit that specifically controlled radiological safety levels. *United States v. Manning*, 434 F.Supp.2d 988, 996 (E.D. Wa. 2006). Board action in this case is clearly not analogous, and the actions NEC has suggested do not even come close to providing a similar attempt to regulate radiological safety levels. Therefore, the Court's decision in *Manning*, which is consistent with *PG&E* and *General Electric*, suggests that absent that same motivation and attempt to regulate within NRC's sphere of radiological safety, the Board is not preempted from taking action to ameliorate the economic and land-use related affects of the tritium leaks.

Therefore the imposition of penalties and sanctions remains within the Board's jurisdiction, as does the authority to require Entergy to conduct a thorough examination of all underground and buried pipes as well as the potential for additional leaks from the CST. All of these actions would be motivated by the need to protect the economic and land-use related interests of Vermont, and would in no way impede upon decision-making with regard to radiological safety levels. In fact, the thorough investigation that NEC is calling for should actually facilitate the Board and Entergy's decision-making regarding the protection of the site

from further harm rather than impede such decision-making, and it is unclear to NEC why such examinations have not already been undertaken.

There is also no valid argument that the State of Vermont is preempted from applying its pollutant discharge laws, 10 V.S.A. §§ 1259, 1263, and finding that sanctions are appropriate for the unpermitted and uncontrolled release of contaminants at the VY station.⁸ In an analogous case, *Kerr-McGee v. City of West Chicago*, the U.S. Court of Appeals for the Seventh Circuit held that the Atomic Energy Act did not preempt application of a city's sedimentation and erosion control regulations to a nuclear waste disposal project. The Court found that even though erosion and sedimentation are mentioned in the federal regulations, the city's regulations did not directly interfere with the regulation of radiological hazards. *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820 (6th Cir. 1990).

Similarly, applying Vermont's pollutant discharge laws, which are discussed in ANR's testimony, and which have clearly been violated by the unpermitted release of tritium infused water from the AOG leaks, presents no direct or substantial interference with the regulation of radiological hazards at VY, and would in no way impede upon the NRC's jurisdiction over radiological health and safety. These laws have been violated regardless of the composition of the discharge. Entergy has had to abide by these laws since they purchased VY, and has always operated subject to ANR's authority regarding pollutant discharge, including the discharge of radionuclides, and therefore it is unclear how the enforcement of these laws would now impede Entergy's decision-making with respect to radiological safety levels. There is nothing to suggest that NRC can or even wants jurisdiction over these matters and, as is discussed further below, Entergy's preemption argument loses any semblance of logic when they argue that NRC has

⁸ See ANR Testimony 7/2/10 (showing that the release of contaminants from the leaks was uncontrolled and unpermitted) and discussion *supra*.

exclusive jurisdiction over issues that they do not enforce, such as CWA authority delegated to the state of Vermont.

Finally, NEC must point out that none of the actions that NEC has suggested be taken by the Board in response to the leaks seek to regulate the construction or operation of VY. Entergy's arguments rely heavily on a statement found in *PG&E* wherein the Court provided that "we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with NRC's exclusive authority over plant construction and operation." *PG&E* at 212. Entergy, however, takes this statement to mean that absolutely nothing can be done by the Board that could in any way affect plant operations. This is clearly not what the Court intended, given that the Court also provided for dual jurisdiction over nuclear power plants, with states retaining traditional authority over economic and land-use concerns as is discussed above.

In fact, this language from *PG&E* upon which Entergy relies is followed by a discussion that limits its applicability, making it clear that preemption is limited to situations in which a state attempts to impose safety regulations regarding radiological standards, which would clearly affect the operation of a plant and therefore be preempted by NRC jurisdiction. *PG&E* at 212-213. The Board is not being asked in this docket to institute any standards or protocols regarding radiological safety that would affect plant operations. Therefore this language from *PG&E* is inapplicable to the current matter. Entergy's misuse of this language should be disregarded, and the Board should find that it is not preempted from taking the actions that NEC has proposed in response to the leaks.

- ii. The NRC Has Not, And Will Not, Take Action To Protect The Economic And Land-Use Related Concerns Of Vermont, Therefore Board Action Is Required.

The NRC has not, and most likely will not, take the actions that NEC has discussed above, and which are necessary to protect Vermont's interests; therefore there is no valid basis for Entergy's preemption arguments. In Docket 7082, the Board stated that:

We also find it hard to understand the validity of a preemption argument where, as here, there has been such a failure by DOE to fulfill its statutory responsibilities to take ownership of and remove the spent nuclear fuel in a timely manner, with the result that the state of Vermont may need to absorb some risk.

Petition of Entergy Nuclear Vermont Yankee, Docket 7082, Order of 4/26/06 at 64-65. There has been a similar failure by the NRC in this matter to ensure that the tritium leaks do not cause economic and land use related harms to the state of Vermont. NRC oversight failed to prevent leaks that should have been discovered up to two years ago (based on reports of sink holes in the vicinity of the AOG discussed *supra*), and NRC oversight failed to ensure that underground and buried piping was adequately inspected and maintained.

Moreover, the NRC has not ensured that Entergy has taken sufficient measures to address and remediate the contamination of the soil, groundwater and aquifers at and around the VY station and to ensure that these resources are protected. *See* Testimony of Stratton French 6/30/10 and Testimony of Raymond Shadis 7/2/10 at 8-9 ("NRC oversight response is so widely varied as to be almost unpredictable; bordering on capricious.").¹⁰ Furthermore, traditionally the NRC will only take enforcement action if leaks occur in systems necessary to reactor safety; not systems necessary to plant operation or affecting the environment generally. *Id.* at 6-7.

¹⁰Additionally, in 1997 EPA found that NRC residual radiation standards were "not protective of human health" under EPA guidelines and that even those more protective guidelines were not asserted to be protective of biota other than humans. Testimony of Raymond Shadis 7/2/10 at 14-15.

In the NRC *Senior Management Review of Groundwater Task Force Report*¹¹ at C-10 (June 11, 2010), the task force concluded that:

The final decommissioning rule now before the Commission (SECY-09-0042) is not intended to, and would not require immediate remediation, if there exists a potential for contamination to migrate to potable aquifers and/or subsurface water bodies.

This is consistent with the sentiments expressed by NRC's General Counsel Stephen G. Burns, who stated, in a letter dated July 9, 2010 to Jim Riccio, Greenpeace's Nuclear Policy Analyst, that "the NRC has certainly never denied that States have some authority over groundwater," and went on to suggest that a state (Illinois in that case) does have the authority to take some action against a licensee nuclear power plant. *See* Letter from Stephen G. Burns, General Counsel, NRC, to Jim Riccio, Nuclear Policy Analyst, Greenpeace at 1 (July 9, 2010) (attached hereto). This letter suggests that the NRC itself does not assert sole authority over issues pertaining to groundwater contamination from radionuclides, stating that "Indeed, some years ago, when the NRC was considering what form of regulation would be best for in situ leach mining facilities, the NRC initially sought to have the States regulate groundwater at such facilities." *Id.*

It is therefore clear that there has been no attempt by the NRC as a federal agency to occupy the field of groundwater contamination from uncontrolled discharges of radionuclides. *See PG&E*, 461 U.S. at 213 (A federal statute precludes state action by field preemption only when a federal statutory scheme is so pervasive that it leaves no room for the states to regulate further in a given field or an identifiable portion of it). The NRC has not, as far as NEC is aware, taken any action in response to these leaks to ensure that adequate additional funds are going to be available to decommission the site and return it to Greenfield status, nor have they required Entergy to undertake a full-scale analysis of all underground and buried piping or the CST area

¹¹ NRC ADAMS accession number ML101680435.

to ensure that other tritium sources are not continuing to contaminate the VY station, and so that future leaks may be prevented.

The risk to Vermont is simply too great for the Board to concede jurisdiction over economic and land use matters that clearly are within the states purview pursuant to *PG&E*, especially when NRC has not provided sufficient oversight or protections. As in Docket 7082, this suggests that the Board cannot rely on NRC action, and must question the validity of Entergy's preemption arguments, since NRC is failing to take (or does not want to take) necessary actions in response to the leak of radionuclides to protect Vermont. Board action is justified, necessary and there is no basis in logic or law for Entergy's attempt to broaden the scope of preemption and thereby handcuff the Board, and prevent Vermont from protecting its interests.

4. Conclusion

For the foregoing reasons, the Board should find that Entergy is precluded from rearguing whether the Board has jurisdiction over issues pertaining to the economic and land-use related interests of Vermont, even where those matters are related to radionuclides at the VY station, which was decided in Docket 7082. The Board should also find that the actions NEC has recommended the Board take in response to the leaks are clearly motivated by non-preempted economic and land-use related concerns, and do not infringe upon the jurisdiction of NRC.

Dated at Jericho, Vermont this 26th day of August, 2010.



Jared M. Margolis, Esq.
243 Cilley Hill Rd.
Jericho, VT 05465